U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: July 15, 1998
Case No.: 97-INA-258

In the Matter of:

Veniero's Paticceria & Cafe
Employer,

on behalf of:

Clemente Torres
Alien.

Appearance: Alan A. Mendel, Esq.
New York, New York
for Employer and Alien

BEFORE: Burke, Vittone, and Wood
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Clemente Torres, ("Alien") filed by Employer Veniero's Paticceria & Cafe ("Employer"), pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, New York, New York, denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On March 31, 1995, Employer filed an application for labor certification to enable Alien to fill the position of Cook, Pastry. (AF 1-39). The job duties for the position include:

> Prepare various Italian pastries, including: biscotti, eclair, sfogliatella, napolean, tartufo, pignoli tart, baba rum, chocolate covered cannoli, french cannoli, strawberry milligoflia, strawberry tart, italian cheesecake, zuppa inglese and sachertorte.

(AF 13). The experience required is two years in the job offered. *Id*.

In the Notice of Findings ("NOF") issued on June 24, 1996, the CO proposed to deny certification on the grounds that Employer's requirement of experience in baking each item listed on the ETA 750-A is "unrealistic and restricted to alien's background" in violation of § 656.21(b)(2). (AF 46). Employer was directed to amend the experience requirement, or document the business necessity of the requirement by defining and documenting the experience requirement, documenting the percentage of time spent on making each specialty, identifying all bakers and their ability to make each specialty, documenting that it is a normal requirement in the industry, and documenting how all present and past employees had to meet this requirement. (AF 45-46). The CO also found that one U.S. applicant appeared to be qualified and was rejected solely because she could not prepare sfogliatella. (AF 44).

Employer submitted its rebuttal on July 22, 1996. (AF 48-58). Employer asserted that they "have a reputation for making and selling sfogliatella," and that they sell 1200-1500 of these pastry items per week which is more than "all other pastries in production and sales." (AF 57). Employer further asserted that three "long-standing employees" were hired "only after first showing they had over two years experience making speciality pastry dishes including sfogliatella." (AF 56). Employer also included an affidavit from Alien's prior employer which indicated that Alien had two years experience making sfogliatella. (AF 50).

The CO issued the Final Determination ("FD") on August 23, 1996, (AF 60-63), denying certification because Employer failed to document the business necessity of the sfogliatella requirement and failed to document that the U.S. applicant was rejected for lawful reasons.

On September 18, 1996, Employer filed a request for reconsideration. (AF 64-79). Included with this request were affidavits from two of Employer's workers stating that they had sfogliatella experience prior to being hired by Employer. On November 19, 1996, the request for reconsideration was denied. (AF 106). On November 20, 1996, Employer filed additional information and requested judicial review. (AF 80-105). On April 10, 1997, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("Board").

DISCUSSION

This Panel has not considered the documentation submitted by Employer with its request for reconsideration as it was not considered by the CO in its denial and could have been submitted on rebuttal. Our review is based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. § 656.27

(c). *See Sharp Screen Supply, Inc.*, 94-INA-214 (May 25, 1995); *ST Systems, Inc.*, 92-INA-279 (Sept. 2, 1993); *Schroeder Brothers Co.*, 91-INA-324 (Aug. 26, 1992).

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. Thus, the employer cannot use requirements that are not normal for the occupation or not included in the Dictionary of Occupational Titles (DOT), unless the employer establishes business necessity for that requirement. The questions of whether a job requirement represents the employer's actual minimum requirement and whether it is an unduly restrictive job requirement are similar. In most instances where the CO questions whether the job requirement is appropriate for the job the regulatory authority cited is § 656.21(b)(2), which governs unduly restrictive job requirements. In a few instances, however, the CO did not raise, or failed to preserve, the § 656.21(b)(2) violation, and the question of the appropriateness of the job requirement has been analyzed under § 656.21 (b)(5). *See, e.g., Loews Anatole Hotel*, 89-INA-230 (Apr. 26, 1991) (*en banc*); *Duval-Bibb Co.*, 88-INA-280 (Apr. 19, 1989). In this case, the CO cited § 656.21(b)(2) in the NOF thereby preserving the alleged violation of § 656.21(b)(2). However, the CO required Employer to submit documentation that "all of the skills are required for all individuals for this same position." (AF 45). This raises the issue of whether the sfogliatella requirement is an actual minimum requirement which should be analyzed using § 656.21(b)(5).

Case law has established that to provide adequate notice, the CO must identify the section or subsection allegedly violated and the nature of the violation. *See Flemah, Inc.*, 88-INA-62 (Feb. 21, 1989) (*en banc*). In this case, the CO failed to identify § 656.21(b)(5), but given the relationship between § 656.21(b)(2) and § 656.21(b)(5), and the fact that the CO did clearly describe the violation of § 656.21(b)(5) and provided clear guidelines to Employer on how to rebut the finding, we find that the CO provided adequate notice of the violation to Employer and properly analyzed the sfogliatella requirement under § 656.21(b)(5).

Section 656.21(b)(5) provides:

> the employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

Under the first prong of § 656.21(b)(5), an employer must demonstrate that the requirements it specifies for the job are its actual minimum requirements and that it has not hired the alien or other workers with less training or experience for jobs similar to the one offered. *Texas State Technical Institute*, 89-INA-207 (Apr. 17, 1990); *Construction Quality Consultants*, 90-INA-517 (Jan. 17, 1992). The employer must provide directly relevant and reasonably obtainable documentation that is requested by the CO. *See Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*).

To document that Employer's requirements are their actual minimum requirements, the CO in this matter requested that Employer

> list the number and names of current and past employees who possessed all of the skills questioned upon hire, identifying hire dates and where and when each acquired them supplying resumes and/or employment applications in support of claims, and document that all skills are required for all individuals hired for this same position.

In rebuttal, Employer merely asserted that "three of our long-standing employees joined our firm but only after first showing they had over two years experience making specialty pastry dishes including sfogliatella" and listed the names of the employees. (AF 56). Employer failed to provide any of the documentation requested by the CO. We find that the documentation requested by the CO was reasonably obtainable by Employer, and therefore, Employer failed to meet their burden of proving that they have not hired workers without first testing and documenting their ability to make sfogliatella. An employer's failure to produce a relevant and reasonably obtainable document requested by the CO is ground for the denial of certification, *see STLO Corporation*, 90-INA-7 (Sept. 9, 1991); *Oconee Center Mental Retardation Services,* 88-INA-40 (July 5, 1988), especially where the employer does not justify its failure.

In regards to the rejection of the U.S. applicant, we also find that Employer failed to document lawful reasons for her rejection. In reporting their recruitment results, Employer noted that during her interview, the U.S. applicant was asked to "make several of the pastries required by the position in question. She was not able to make sfogliatella."[1] (AF 34). Therefore, the U.S. applicant was rejected solely because she could not make one of the fourteen pastries listed on the ETA 750-A.

The second prong of § 656.21(b)(5) provides that if the employer cannot demonstrate that the job requirements are the actual minimum ones or that it has not hired workers with less training and experience, then it can attempt to demonstrate that is not feasible to hire workers with less training or experience than that required by the job offer. Although the U.S. applicant's resume shows over seven years experience as a Baker, Pastry Chef, and owner/chef of a pastry shop in Italy, Employer claimed on rebuttal that they "could not teach or train a new worker for two years before he or she is able to perform the job." We do not believe Employer adequately demonstrated that it would take two years to train the U.S. applicant how to make sfogliatella given her seven years of qualifying experience. Furthermore, Employer has "about four other employees" that "hold jobs similar to that offered to the alien." (AF 6). This means that there are at least four people to train the U.S. applicant and to make the sfogliatella while the U.S. applicant is being trained. Additionally, we note that Alien had no pastry experience prior to the two years of qualifying experience with a different employer, but was able to perform all of the

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[1]In its motion for reconsideration, Employer stated that it takes three days to prepare sfogliatella. (AF 76). This causes us to question how Employer was able to test the U.S. applicant's ability to prepare sfogliatella during the interview.

listed job duties while with that employer. (AF 50). This further illustrates that Employer's requirement is unduly restrictive.

We find that Employer failed to document the business necessity of the sfogliatella requirement and that the U.S. applicant was rejected for other than lawful reasons. Therefore, certification was properly denied on these grounds.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

For the Panel:

JOHN M. VITTONE
Chief Administrative Law Judge

Judge Pamela Lakes Wood, concurring:

While I concur in the result, I do not agree with the majority's reliance upon 20 C.F.R. § 656.21(b)(5), which was not even mentioned in the Notice of Findings or the Final Determination. Had that section been the basis for the denial of labor certification, the Employer would have been provided with the opportunity to establish infeasibility to train. However, the CO instead relied upon failure to establish business necessity under 20 C.F.R. § 656.21(b)(2) for the requirement that the applicant have two years of experience making each of the pastry items, including sfogliatella. I would find the Employer's assertion that it has a reputation for making and selling sfogliatella and sells 1200 to 1500 of this particular pastry item each week to be sufficient to establish business necessity for this experience as a core duty of the position.

The reason that I concur in the result is that I agree that the Employer has failed to establish that applicant Marconi is not qualified for the position. Although Employer interviewed the applicant, its bare assertion that the applicant was unable to make sfogliatella is inadequate when considered along with the applicant's extensive experience and her personal account of the interviewing process. Such a test administered as part of the interviewing process is too subject to abuse for the Employer's bare assertion without specific details to establish the applicant's inadequacy. Accordingly, I concur in the denial of labor certification.

PAMELA LAKES WOOD
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.